

United States
Circuit Court of Appeals

For the Ninth Circuit. 12

MELVIN WHITEHEAD and FERN PECK, by
her guardian ad litem, Ellen Barnard,
Appellants,

vs.

REPUBLIC GEAR COMPANY, a corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

MAR 26 1938

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

SHANK, BELT, RODE & COOK,

1401 Joseph Vance Bldg.,
Seattle, Washington,

Attorneys for Appellants.

BOGLE, BOGLE & GATES,

603-624 Central Bldg.,
Seattle, Washington,

Attorneys for Appellee. [1*]

In the Superior Court of the State of Washington
for the County of Skagit
No. 15524

Dist. Court No. 21161

FERN PECK, a minor by her guardian ad litem,
Ellen Bernard,

Plaintiffs,

vs.

MORRISON MILL CO., a corporation, REPUB-
LIC GEAR COMPANY, a corporation, and
FRANK DAY,

Defendants.

PETITION FOR APPOINTMENT OF
GUARDIAN AD LITEM

Comes now Ellen Barnard, and petitions the
Court for an order appointing her as guardian ad

*Page numbering appearing at the foot of page of original certified
Transcript of Record.

litem of Fern Peck, a minor, and shows to the Court as follows:

I.

That Fern Peck is an infant of the age of twenty years, being born on the 6th day of December, 1916, and resides with her mother Ellen Barnard in Mount Vernon, Washington. That the said Fern Peck has no general or testamentary guardian.

II.

That said Fern Peck has a cause of action against the defendant Morrison Mill Co., and the Republic Gear Company and Frank Day, as follows:

That on the 25th day of *J*uanuary, 1937, at about twelve o'clock P. M., while riding as a passenger in the automobile of Melvin Whitehead, they had a collision with a Kenworth Truck, owned by the Morrison Mill Co., a corporation and operated at the time of the collision by Frank Day, its agent and employee.

III.

That said minor has not been paid any sum whatsoever for settlement, as the result of said injuries and damages sustained and the said injuries consist of cuts from her hair line in the middle of her forehead, down to the bridge of her nose, one cut across the nose from cheek to cheek, one cut on the upper lip under the right nostril and a cut on the lower lip and chin, also a cut on the right side of her head, injuries to both knees and to her back. [2]

IV.

That Ellen Barnard, the mother of said minor, is a competent and proper person to become guardian ad litem of said minor Fern Peck, for the purpose of prosecuting a cause of action against the defendants Morrison Mill Co., Republic Gear Company and Frank Day, for the collision or damages so sustained by said minor.

Wherefore your petitioner prays that she be appointed guardian ad litem for Fern Peck, a minor, to prosecute said action on her behalf.

WARREN J. GILBERT

Attorney for Plaintiffs

[Endorsed]: Skagit County, Wash. Filed Apr. 23, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy.

State of Washington,
County of Skagit—ss.

Ellen Barnard, being first duly sworn upon oath, deposes and says: That she is the petitioner above named, that she has read the foregoing petition and that the contents thereof and that all the matters and things therein alleged are true.

ELLEN BARNARD

Subscribed and sworn to before me this 23rd day of April, 1937.

WARREN J. GILBERT

Notary Public in and for the State of Washington,
residing at Mount Vernon. [3]

[Title of Court and Cause Skagit County.]

ORDER APPOINTING GUARDIAN AD LITEM

This matter comes on for hearing, on this 23rd day of April, 1937, upon the petition of Ellen Barnard, mother of Fern Peck, a minor, for an order appointing her guardian ad litem of said Fern Peck, Petitioner appearing in person and orally requesting the appointment of her said mother as herein ordered and from the pleadings, files and evidence the court finds:

I.

That Fern Peck is an infant of the age of twenty years, being born on the 6th day of December, 1916, and resides with her mother Ellen Barnard in Mount Vernon, Washington. That the said Fern Peck has no general or testamentary guardian.

II.

That the said Fern Peck has a cause of action against the defendant Morrision Mill Co., and the Republic Gear Company and Frank Day, as follows:

That on the 26th day of January, 1937, at about twelve o'clock P. M., while riding as a passenger in the automobile of Melvin Whitehead, they had a collision with a Kenworth truck, owned by the Morrision Mill Co., a corporation and operated at the time of the collision by Frank Day, its agent and employee.

III.

That said minor has not been paid any sum what-

soever for settlement, as the result of said injuries and damages sustained and the said injuries consist of cuts from her hair line in the middle of her forehead, down to the bridge of her nose, one cut across the nose from cheek to [4] cheek, one cut on the upper lip under the right nostril and a cut on the lower lip and chin, also a cut on the right side of her head. Injuries to both knees and to her back.

IV.

That Ellen Barnard, the mother of said minor, is a competent and proper person to become guardian ad litem of said minor Fern Peck, for the purpose of prosecuting a cause of action against the defendants Morrison Mill Co., Republic Gear Company and Frank Day, for the collision or damages so sustained by said minor.

It is therefore hereby ordered that Ellen Barnard be, and she hereby is appointed guardian ad litem of Fern Peck, a minor, for the purpose of prosecuting the said action against the defendants Morrison Mill Co., a corporation, Republic Gear Company, a corporation and Frank Day, hereinabove referred to.

Done in open Court this 23rd day of April, 1937.

W. L. BRICKEY

Judge

[Endorsed]: Skagit County, Wash. Filed Apr. 23, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [5]

[Title of Court and Cause Skagit County.]

SUMMONS

The State of Washington, to the said Morrison Mill Co., a corporation; Republic Gear Company, a corporation and Frank Day, above named Defendants:

You and each of you are hereby summoned to appear, within twenty (20) days after the service of this Summons, exclusive of the day of service, if service is made upon you within the State of Washington, or within sixty (60) days after the service of this Summons, exclusive of the day of service, if service is made upon you without the State of Washington, and defend the above entitled action in the above entitled court and answer the complaint of plaintiff herein, and serve a copy of your Answer upon the undersigned attorney for plaintiff, at his office hereinbelow stated; and in case of your failure so to do, judgment will be entered against you according to the demands of the complaint which has been filed with the Clerk of the above entitled Court, a copy of which is herewith served upon you.

Attorneys for Plaintiffs

Office and Post Office Address:

Matheson Building,

Mount Vernon, Washington.

[Endorsed]: Skagit County, Wash. Filed Apr. 26, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [6]

[Title of Court and Cause Skagit County.]

COMPLAINT

Come now the plaintiffs, for their causes of action against the defendants, allege as follows:

I.

Melvin Whitehead, for his first cause of action against the defendant alleges: That the Morrison Mill Co., is a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, doing business in Skagit County, State of Washington, and that at all times herein mentioned, was the owner of a Kenworth truck, registration number 20563.

II.

That at all the times hereinafter mentioned, the defendant Republic Gear Company, was and now is a corporation, duly organized and existing with its principal office at Detroit, Michigan, but with an office for the transaction of business in the City of Seattle, King County, Washington, and that said defendant during all the times hereinafter mentioned was and still is, doing business within the State of Washington.

III.

That Melvin Whitehead, at all times herein mentioned was the owner of one Dodge coupe, 1936 model, engine number D2-135527 and serial number 4026463.

IV.

That at all times hereinafter referred to, the defendant Republic Gear Company was and now is engaged in the manufacturing, distributing and sale of axles for use in trucks, and at some time prior to November [7] 12, 1936, had sold to the Lewis Motor Company of Bellingham, for the purpose of resale to the public, an axle which appeared to be, and if it had not been for the defects hereinafter set forth, would have been, a suitable, safe and proper axle to be installed in the truck of the defendant Morrison Mill Company as hereinafter described, and on or about the 12th day of November, 1936, the defendant Morrison Mill Co., purchased the said axle from the said Lewis Motor Company and installed the same in a said Kenworth two ton truck, registration number 20463, then owned by the defendant Morrison Mill Co.

V.

That the said Republic Gear Company during all the times prior to the said purchase and subsequent thereto advertised and represented to the public that the said axle was of chrome steel, and was a suitable, safe and proper axle to be installed and used in such trucks as the said truck of the defendant Morrison Mill Co., and there was nothing about the *the* said *axel* which was or would be apparent to a purchaser in the exercise of ordinary care to indicate to such purchaser, or give to such purchaser, any notice of the defects hereinafter set forth.

VI.

That as a proximate result of the negligence of the defendant Republic Gear Company in its manufacture and inspection the said axle was defective in the following particulars, to-wit: It was constructed of defective material, in its construction it had been treated with improper heat treatment, it had been shaped with improper fillets, and, in consideration of the other defects hereinabove specified, it was of inadequate shape and size.

VII.

That the said defendant Morrison Mill Co., after purchasing the said axle installed the same upon its said truck, and in the course of the use of the said truck between the said date of purchase and the time of the accident hereinafter set forth, and as a result of each and all [8] of the defects hereinabove set forth, a defect known to metallurgists as a "fatigue fracture" developed in the said axle.

VIII.

That about midnight of the 26th day of January, 1937, while the said truck of the defendant Morrison Mill Co., was being operated upon the Pacific Highway upon the bridge whereby the said Pacific Highway crosses the Skagit River in Skagit County, Washington, and as a proximate result of the defects in said axle as hereinbefore set forth, the said axle broke, and the said truck thereby became disabled upon the said Pacific Highway, and unable to move under its own power.

IX.

That said truck heavily loaded with boxes was stopped on the west half of said paved highway, directly in the lane of travel, on said highway, for traffic proceeding in a southerly direction. That said truck was parked without a tail light or any lights in the rear whatsoever. That said truck could have been coasted off of the paved portion of said highway before it came to a stop and after said axle broke. That said truck was left without any light guard, signal or watchman by the driver and employee of the Morrison Mill Co., and during his absence, and while said truck was so standing in its disabled condition and as the proximate result of said defects and said axle and the negligence of the said defendant Republic Gear Company as hereinbefore set forth; and as the proximate result of the negligence of the defendant Mirrosion Mill Co., and its agent and employee Frank Day, in leaving said truck parked on said highway without any tail lights, running lights, or end lights and without a person to direct traffic, and as the proximate result of the negligence of said defendants in not driving said truck off of the main portion of said highway, the car which was being operated by the plaintiff Melvin Whitehead in a prudent and careful manner, came into violent collision with said truck, causing the damages hereinafter alleged.

X.

That as the result of the negligence of the said

defendants, this plaintiff suffered severe personal injury, consisting of a blow to the [9] top of his head, cuts on his forehead and a severe blow to his chest, which caused him and still continues to cause him great pain and suffering, on account of which he was unable to work for a period of sixty days. That he was capable of earning \$100.00 per month as a truck driver during said time and was regularly employed at the time of said accident. That he has been required to pay medical expenses and doctors bills in the sum of \$100.00, all to his damage in the sum of \$2000.00.

For a second cause of action, the plaintiff complains of the defendants and further alleges:

I.

That he repeats all of the allegations contained in paragraphs I to IX both inclusive, of his first cause of action and makes the same a part hereof, by this reference.

II.

That as a proximate result of the defendants' aforesaid negligence, as hereinabove alleged, the 1936 Dodge Coupe, serial number 4026463 and engine number D2-135527 owned by the plaintiff was completely demolished to his damage in the sum of \$775.00.

And for a third cause of action against the defendants, Fern Peck, by her guardian ad litem alleges:

I.

That Ellen Barnard has been appointed guardian ad litem for the plaintiff, Fern Peck and authorized to bring this action.

II.

That the plaintiff realleges and makes a part of this cause of action, paragraphs I, II, III, IV, V, VI, VII, VIII and IX, of the cause of action of Melvin Whitehead and by reference, makes all of said allegations a part of this cause of action.

III.

That as the result of the negligence of the said defendants, this plaintiff received several lacerations on her face, extending from the line of her hair in the middle of her forehead, down to a point between the two eyebrows; a cut across her nose from one cheek to the other, cutting into the bridge of the nose, severing of upper lip below [10] the right nostril, a cut on the right side of her chin, a cut on the lower lip and a cut on the right side of her head. That it was necessary to use twenty-seven sutures in order to bind said lacerations and that as a result thereof, the plaintiff has permanent scars left on her face which change the contour of her face and mouth and cause her great embarrassment and mental anguish. That said scars have permanently disfigures and changed the contour and expression of her face. That the plaintiff was an attractive girl before said accident, but now she has been made unattractive by reason of said per-

manent scars. That the plaintiff received a severe blow to her back and both knees were injured all said injuries causing her severe pain and discomfort. That the plaintiff was an ablebodied person, capable of earning \$90.00 per month at the time of said accident and was employed at the wage of \$60.00 per month and board, at the time of said accident; and she was prevented by reason of said injuries from performing said duties for a period of two months, all to her damage in the sum of \$7,500.00. That it was necessary for the plaintiff to employ medical assistance and hospital aid, all for the reasonable sum of \$250.00, which it will be necessary for her to pay.

Wherefore, plaintiffs pray for judgment against the defendants, in the following sums, to-wit:

On their first cause of action, the sum of \$2,100.00.

On their second cause of action the sum of \$775.00.

On their third cause of action, the sum of \$7,750.00, and for such other and further relief as the pleadings, files and evidence will warrant.

WARREN J. GILBERT

Attorney for Plaintiffs [11]

State of Washington,
County of Skagit—ss.

Ellen Barnard, being first duly sworn upon oath deposes and says: That she is the guardian ad litem for the plaintiff Fern Peck, named in the above entitled action. That she makes this verification as such guardian ad litem, that she has read the

above and foregoing complaint, knows the contents thereof and that the allegations contained therein are true, as she verily believes.

ELLEN BARNARD

Subscribed and sworn to before me this 22nd day of April, 1937.

WARREN J. GILBERT

Notary Public in and for the State of Washington,
residing at Mount Vernon.

[Endorsed]: Skagit County, Wash. Filed Apr. 26, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [12]

[Title of Court and Cause Skagit County.]

AFFIDAVIT OF SERVICE OF SUMMONS
AND COMPLAINT ON REPUBLIC GEAR
COMPANY, A CORPORATION

The State of Washington,
County of King—ss.

C. G. Tackaberry, being first duly sworn, on oath deposes and says:

That he now is, and at all times herein mentioned was, a citizen of the United States and of the State of Washington, over the age of twenty-one years, competent to be a witness in the above entitled action, and not a party thereto.

That on the 23rd day of April, 1937, he served the Summons and Complaint in the above entitled ac-

tion on the defendant, Republic Gear Company, a corporation, by delivering to and leaving with T. F. Barsby, Residential Statutory Agent of said Republic Gear Company in the State of Washington, personally, at 1722 Broadway Ave., Seattle, in King County, Washington, a copy of said summons and therewith a copy of said Complaint for the said Republic Gear Company, a corporation.

C. G. TACKABERRY

Subscribed and sworn to before me this 23rd day of April, 1937.

BURTON J. WHEELON

Notary Public in and for the State of Washington,
residing at Seattle.

[Notarial seal of Burton J. Wheelon

Commission expires Sept. 17, 1940]

[Endorsed]: Skagit County, Wash. Filed Apr. 26, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [13]

[Title of Court and Cause Skagit County.]

DEMURRER

Comes now Republic Gear Company, one of the defendants above named, and demurs to plaintiff's complaint herein and each cause of action therein upon the ground and for the reason that the same

fails to state facts sufficient to constitute a cause of action against this defendant.

BOGLE, BOGLE & GATES

Attorneys for Defendant
Republic Gear Company

[Endorsed]: Skagit County, Wash. Filed May 11, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [14]

[Title of Court and Cause Skagit County.]

NOTICE OF ISSUE OF LAW AND NOTE FOR
MOTION CALENDAR

Nature of this action; Demurrer.

To the Clerk of the above entitled Court: Please note above Demurrer for argument on the motion calendar for Monday May 24th, 1937.

WARREN J. GILBERT

Attorney for Plaintiffs

To Bogle, Bogle & Gates, Attorneys for Defendant Republic Gear Co.: Please take notice that the above entitled issue will be brought on for argument, before the Court on Monday, the 24th of May, 1937.

Attorney for Plaintiffs

We acknowledge receipt of a true copy of the within notice and accept service thereof.

BOGLE, BOGLE & GATES

Attorneys for Republic Gear Co.

[Endorsed]: Skagit County, Wash. Filed Jun. 1, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [15]

[Title of Court and Cause Skagit County.]

PETITION FOR REMOVAL

The petition of the defendant Republic Gear Company, a Michigan corporation, respectfully shows:

I.

That on or about the 26th day of April, 1937, the above entitled action, which is an action of a civil nature, was brought in this court by the above named plaintiffs against your petitioner as one defendant, and against the Morrison Mill Co., a corporation, and Frank Day as co-defendants.

That your petitioner was at the time of the commencement of said action, ever since has been and now is a foreign corporation, being a corporation created and existing under the laws of the State of Michigan and by virtue thereof at all of said times was and still is a citizen and resident of the State of Michigan and a non-resident of the State of Washington; that the plaintiffs at the time of the commencement of said action were, ever since have been and still are citizens and residents of the State of Washington; that the defendants Morrison Mill Co. and Frank Day at the time of the commencement of said action were, ever since have been and still are citizens and residents of the State of Washington.

II.

That plaintiffs' original complaint herein contains allegations of negligence on the part of your peti-

tioner, as well as on the part of Morrison Mill Co., a corporation, and Frank Day, and seeks judgment against all defendants in the total sum of \$10,625. That plaintiffs' original complaint herein, a part of the records and files in this cause [16] in the above entitled court, is hereby referred to and by this reference made a part hereof as though fully set forth herein. That subsequent to the filing of said complaint and within the time allowed by law, your petitioner served and filed a demurrer to said complaint upon the ground that said complaint failed to state facts sufficient to constitute a cause of action against your petitioner, and although argument has been had to the court upon said demurrer, the same remains undisposed of, and no order has been entered sustaining or overruling the same. That by reason of the fact that the defendant Morrison Mill Co., and the defendant Frank Day were citizens and residents of the State of Washington and jointly charged with negligence with your petitioner, said action was not removable under the laws of the United States pertaining to removal of actions.

III.

That on the 15th day of September, 1937, counsel for your petitioner were served by plaintiffs with an amended complaint in the above entitled action, in which the allegations of negligence as against the defendants Morrison Mill Co. and Frank Day, contained in the original complaint, were entirely omitted, and said amended complaint as to said de-

defendants Morrison Mill Co. and Frank Day is clearly demurrable in that said amended complaint fails to state facts sufficient to constitute a cause of action against said defendants, or to state any cause of action whatsoever against said defendants Morrison Mill Co. and Frank Day, or either of them, or if said amended complaint does state any cause of action as against said defendants Morrison Mill Co. and Frank Day, which this petitioner specifically denies, the said cause of action and the liability, if any, upon which the same is based, are entirely distinct, separate and separable from the cause of action alleged in said complaint against your petitioner and the liability, if any, upon which the same is based. That the liability, if any, of your petitioner, as alleged in plaintiffs' amended complaint, and the liability, if any, of said defendants Morrison Mill Co. and Frank Day, as alleged in said amended complaint, are in no sense joint, but are entirely separable; and that this suit as against [17] your petitioner constitutes a separable controversy. That your petitioner is informed and believes and therefore alleges that following the institution of this suit and prior to the service and filing of the said amended complaint, plaintiffs and said defendants Morrison Mill Co. and Frank Day entered into a combination, understanding and agreement for the settlement of the liability, if any, of said defendants Morrison Mill Co. and Frank Day to said plaintiffs, pursuant to which it was agreed between said plaintiffs and said defendants, without the

consent of your petitioner, that plaintiffs would serve and file an amended complaint, omitting any allegations of negligence as against said defendants Morrison Mill Co. and Frank Day, and in such form that the same would fail to state facts sufficient to constitute a cause of action against said defendants, and that a demurrer thereto would be entered and be by the court sustained, thus dismissing said Morrison Mill Co. and Frank Day from this action, leaving your petitioner remaining therein as sole defendant. That as a result of said agreement entered into between said plaintiffs and said Morrison Mill Co. and Frank Day, there is no controversy in actual fact between said plaintiffs and said defendants, and that the joinder of said defendants in said amended complaint as parties defendant is fraudulent, sham and fictitious, and that plaintiffs have no actual intention or purpose whatsoever of seeking or securing recovery in this action as against said defendants Morrison Mill Co. and Frank Day.

That there is in this action a controversy wholly between citizens of different states, which can be wholly and finally determined between your petitioner and the plaintiffs herein, and that said controversy is wholly between your petitioners and said plaintiffs, and that the co-defendants of your petitioner named in the plaintiff's complaint herein are not interested, in view of their settlement agreement heretofore set forth and the allegations of plaintiffs' complaint, in the determination thereof, nor are they necessary, proper or indispensable

parties to said action; and that said controversy, and this action, can be wholly and finally determined between said plaintiffs and your petitioner.

[18]

That said action did not become removable under the laws of the United States relating to removal of causes, until the service and filing of plaintiffs' amended complaint herein on or about the 15th day of September, 1937.

IV.

That said action as set forth in plaintiffs' amended complaint herein is one of a civil nature in which there is a controversy wholly between citizens of different states, plaintiffs being citizens and residents of the State of Washington and your petitioner being a citizen and resident of the State of Michigan.

V.

That in plaintiff's amended complaint herein, served and filed on or about the 15th day of September, 1937, plaintiff demands judgment in the sum of \$9,850, exclusive of interest and costs, against your petitioner by reason of certain personal injuries alleged to have been sustained by said plaintiffs, as a result, among other things, of the alleged negligence on the part of your petitioner as set forth in plaintiffs' amended complaint on file herein.

VI.

That the amount in controversy in the cause of action set forth in plaintiffs' amended complaint

herein exceeds the amount or value of \$3,000, exclusive of interest and costs.

VII.

That said action upon said plaintiffs' amended complaint is pending undetermined in this court, and that the time has not yet arrived in which the defendant is required by the laws of the State of Washington or the rules of the Superior Court of the State of Washington, the court in which this action is brought, to answer or otherwise plead to said amended complaint, and that no application has been made to any court or judge for the order to be applied for in this petition.

VIII.

That the alleged cause of action set forth in said amended complaint is a cause of action of which the District Court of the United States has been and is given original jurisdiction. [19]

IX.

That your petitioner desires to remove this action before the trial thereof and within thirty days from the date of the filing of this petition, into the District Court of the United States for the District in which this action is pending, to-wit, the District Court of the United States for the Western District of Washington, Northern Division and your petitioner makes and files with this petition a bond with good and sufficient surety thereon for its entering in said District Court of the United States with-

in thirty days from the filing of this petition a copy of the record in this action, and for its paying all costs which may be awarded by the said District Court of the United States for the Western District of Washington, Northern Division, if said District Court shall hold this action was wrongfully or improperly removed thereto.

X.

That your petitioner prays that said surety and said bond may be accepted and that this action may be removed into the District Court of the United States for the Western District of Washington, Northern Division, pursuant to the statutes of the United States in such cases made and provided, and that no further proceedings may be had herein in this court except the order to remove, as required by law, and that this Honorable Court make an order approving said bond and an order for the removal of this action, and to that end your petitioner will ever pray.

REPUBLIC GEAR COMPANY

a corporation

By BOGEL, BOGLE & GATES and
STANLEY B. LONG

Its Attorneys [20]

State of Washington,
County of King—ss.

Stanley B. Long, of lawful age, being first duly sworn, upon oath deposes and says:

That he is one of the attorneys of record for the defendant and petitioner Republic Gear Company, a corporation, in the above entitled cause; that said defendant and petitioner is a corporation duly organized and existing under the laws of the State of Michigan, having its principal place of business at Detroit, Michigan; that the reason this verification is made by this affiant on behalf of said defendant and petitioner is that said defendant and petitioner is a foreign corporation, to-wit, a corporation of the State of Michigan; that neither said corporation nor any of its officers is within the State of Washington, and that there is no other person than this affiant within the State of Washington who is authorized to, or is capable of, verifying the within and foregoing petition; that affiant makes this verification for and on behalf of said petitioner and defendant, being thereunto duly authorized; and that he has read the within and foregoing petition for removal, knows the contents thereof, and that the allegations contained therein are true, with the exception only of such allegations as are therein specifically stated to be on information and belief, and as to such allegations affiant believes them to be true.

STANLEY B. LONG

Subscribed and sworn to before me this 16th day of September, 1937.

A. C. SPENCER, Jr.

Notary Public in and for the State of Washington,
residing at Seattle.

[Notarial seal of A. C. Spencer, Jr.,

Commission expires Mar. 15, 1940]

[Endorsed]: Skagit County, Wash. Filed Sept. 16, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [21]

[Title of Court and Cause Skagit County.]

UNDERTAKING

Know All Men by These Presents: That we, Republic Gear Company, a corporation organized and existing under and by virtue of the laws of the State of Michigan, as Principal, and St. Paul-Mercury Indemnity Company of St. Paul, a corporation duly authorized to carry on a surety business in the State of Washington, and duly authorized to execute the within bond as surety, as Surety, are held and firmly bound unto Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, their heirs, representatives, successors and assigns, in the penal sum of Five Hundred Dollars (\$500), lawful money of the United States, for the payment of which sum well and truly to be made unto the said Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, their heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

This bond is upon the condition nevertheless, that Whereas, said Republic Gear Company, a corporation, the principal obligor herein, and one of the defendants in the above entitled action, has filed its petition in the above entitled action in the Superior Court of the State of Washington for Skagit County, for the removal of a certain cause therein pending wherein the said Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, are plaintiffs, and the said Republic Gear Company, a corporation, and Morrison Mill Co., a corporation, and Frank Day, are defendants, to the District Court of the United States for the Western District of Washington Northern Division: [22]

Now, therefore, if the said Republic Gear Company, a corporation, shall enter into the said District Court of the United States for the Western District of Washington, Northern Division, within thirty days from the filing of the petition for the removal of said cause, a copy of the record in said action, and shall well and truly pay all costs that may be awarded by the said District Court of the United States for the Western District of Washington, Northern Division, if the said District Court shall hold that said action was wrongfully or improperly removed thereto, then this obligation shall be null and void, otherwise it shall remain in full force and effect.

In witness whereof, said Republic Gear Company, a corporation, as Principal, and said St. Paul-Mercury Indemnity Company of St. Paul a corporation,

as Surety, have caused this instrument to be executed by their proper officers thereunto duly authorized this 16th day of September, 1937.

REPUBLIC GEAR COMPANY

a corporation

By BOGLE, BOGLE & GATES

STANLEY B. LONG

Its Attorney,

Principal

ST. PAUL-MERCURY INDEMNITY

COMPANY OF ST. PAUL

a corporation

By CASSIUS GATES

Its Attorney-in-Fact

Surety

[Seal of St. Paul-Mercury Indemnity Company
of St. Paul corporate seal 1926 Delaware]

[Endorsed]: Skagit County, Wash. Filed Sept. 16, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy.

Civil Journal 42, page 264. [23]

[Title of Court and Cause Skagit County.]

ACCEPTANCE OF SERVICE

The undersigned attorney for the plaintiff hereby acknowledges service this day of the following papers in the above entitled cause, before filing:

1. Petition for Removal,
2. Undertaking,
3. Notice of Removal,
4. Order of Removal,
5. This Acceptance of Service.

Dated at Seattle, Washington, this 16th day of September, 1937.

WARREN J. GILBERT

Attorney for Plaintiff.

[Endorsed]: Skagit County, Wash. Filed Sept. 16, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [24]

[Title of Court and Cause Skagit County.]

NOTICE OF REMOVAL

To: Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, Plaintiffs above named, and to Warren J. Gilbert, their attorney:

You and Each of You Will Please Take Notice that the defendant Republic Gear Company, a corporation, intends to file its petition and bond for removal, copies of which petition and bond are attached hereto, and that on the 17th day of Sept.,

1937, at the hour of 1:30 o'clock A. M., or as soon thereafter as counsel can be heard, said defendant will apply to the presiding judge of the above entitled court for an order removing the above named cause into the District Court of the United States for the Western District of Washington, Northern Division, pursuant to the statutes of the United States made and provided therefor.

BOGLE, BOGLE & GATES

STANLEY B. LONG

Attorneys for Defendant
Republic Gear Company,
a corporation.

[Endorsed]: Skagit County, Wash. Filed Sept. 16, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [25]



[Title of Court and Cause Skagit County.]

AMENDED COMPLAINT

Comes now the plaintiffs and for an amended complaint against the defendants allege as follows:

I.

Melvin Whitehead, for his first cause of action against the defendants alleges: That the Morrison Mill Co., is a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, doing business in Skagit County, State of Washington, and that at all times herein men-

tioned, was the owner of a Kenworth truck, registration number 20563.

II.

That at all times hereinafter mentioned, the defendant Republic Gear Company was and now is a corporation, duly organized and existing with its principal office at Detroit, Michigan, but with an office for the transaction of business in the City of Seattle, King County, Washington, and that said defendant during all the times hereinafter mentioned was and still is, doing business within the State of Washington.

III.

That Melvin Whitehead, at all times herein mentioned, was the owner of one Dodge coupe, 1936 model, engine number D2-135527 and serial number 4026463.

IV.

That at all times hereinafter referred to, the defendant Republic Gear Company was and now is engaged in the manufacturing, distributing and sale of axles for use in trucks, and at some time prior to November 12, 1936, had sold to the Lewis Motor Company of Bellingham, for the [26] purpose of resale to the public, an axle which appeared to be, and if it had not been for the defects hereinafter set forth, would have been, a suitable, safe and proper axle to be installed in the truck of said Morrison Mill Company as hereinafter described, and on or about the 12th day of November, 1937, said Morrison Mill Company purchased the said axle from

the said Lewis Motor Company and installed the same in the said Kenworth, two ton truck, registration number 20463, then owned by said Morrison Mill Company.

V.

That the said Republic Gear Company during all the times prior to the said purchase and subsequent thereto advertised and represented to the public that the said axle was of chrome steel, and was a suitable, safe and proper axle to be installed and used in such trucks as the said truck of said Morrison Mill Company, and there was nothing about the said axle which was or would be apparent to a purchaser in the exercise of ordinary care to indicate to such purchaser, or give to such purchaser any notice of, the defects hereinafter set forth.

VI.

That as a proximate result of the negligence of the defendant Republic Gear Company in its manufacture and inspection the said axle was defective in the following particulars, to-wit: It was constructed of defective material, in its construction it had been treated with improper heat treatment, it had been shaped with improper fillets, and, in consideration of the other defects hereinabove specified, it was of inadequate shape and size.

VII.

That the said Morrison Mill Company, after purchasing the said axle installed the same upon its said

truck, and in the course of the use of the said truck between the said date of purchase and the time of the accident hereinafter set forth, and as a result of each and all of the defects hereinabove set forth, a defect known to metallurgists as a "fatigue fracture" developed in the said axle. [27]

VIII.

That about midnight of the 26th day of January, 1937, while the said truck of said Morrison Mill Company was being operated upon the Pacific Highway upon the bridge whereby the said Pacific Highway crosses the Skagit River in Skagit County, Washington, and as a proximate result of the defects in said axle as hereinbefore set forth, the said axle broke, and the said truck thereby became disabled upon the said Pacific Highway, and unable to move under its own power, and thereupon remained on the west half of said paved highway directly in the lane of travel on said highway for traffic proceeding in a southerly direction.

IX.

That while the said truck was so stalled as aforesaid on said highway as a proximate result of the negligence of the said defendant Republic Gear Company and the defendant Morrison Mill Company, as hereinbefore set forth, the car which was being driven by the plaintiff Melvin Whitehead in a careful and prudent manner came in violent collision with the said truck, causing the damages hereinafter alleged.

X.

That as the result of the negligence of the said defendants, this plaintiff suffered severe personal injury, consisting of a blow to the top of his head, cuts on his forehead and a severe blow to his chest, which cause him and still continues to cause him great pain and suffering, on account of which he was unable to work for a period of sixty days. That he was capable of earning \$100.00 per month as a truck driver during said time and was regularly employed at the time of said accident. That he has been required to pay medical expenses and Doctors bills in the sum of \$100.00, all to his damage in the sum of \$2,000.00.

For a Second Cause of Action, the plaintiff complains of the defendants and further alleges:

I.

That he repeats all of the allegations contained in paragraph I to IX both inclusive, of his first cause of action and makes the same a part hereof, by this reference.

II.

That as a proximate result of the defendants aforesaid negligence, [28] as hereinabove alleged, the 1936 Dodge coupe, serial number 4026463 and engine number D2-135527 owned by the plaintiff was completely demolished to his damage in the sum of \$775.00.

And For a Third Cause of Action against the defendants, Fern Peck, by her guardian ad litem, alleges:

I.

That Ellen Barnard has been appointed guardian ad litem for the plaintiff Fern Peck, and authorized to bring this action.

II.

That the plaintiff re-alleges and makes a part of this cause of action, paragraphs I, II, III, IV, V, VI, VII, VIII and IX, of the cause of action of Melvin Whitehead and by reference, makes all of said allegations a part of this cause of action.

III.

That as the proximate result of the negligence of the said defendants, this plaintiff received several severe lacerations on her face, extending from the line of her hair in the middle of her forehead, down to a point between the two eye brows; a cut across her nose from one cheek to the other, cutting into the bridge of the nose, severing of upper lip below the right nostril, a cut on the right side of her chin, a cut on the lower lip and a cut on the right side of her head. That it was necessary to use twenty-seven sutures in order to bind said lacerations and that as a result thereof, the plaintiff has permanent scars left on her face, which change the contour of her face and mouth and cause her great embarrassment and mental anguish. That said scars have permanently disfigured and changed the contour and expression of her face. That the plaintiff was an attractive girl before said accident, but now she has been made unattractive by reason of said permanent

scars. That the plaintiff received a severe blow to her back and both knees were injured, all said injuries causing her severe pain and discomfort. That the plaintiff was an able bodied person, capable of earning \$90.00 per month at the time of said accident and was employed at the wage of \$60.00 per month and board, at the time of said accident; and she was prevented by reason of said injuries from performing said duties for a period of two months, all to [29] her damage in the sum of \$7,500.00. That it was necessary for the plaintiff to employ medical assistance and hospital aid, all for the reasonable sum of \$250.00, which it will be necessary for her to pay.

Wherefore, plaintiffs pray for judgment against the defendants, in the following sums, to-wit:

On their first cause of action, the sum of \$2100.00.

On their second cause of action the sum of \$7750.00, and for such other and further relief as the pleadings, files and evidence will warrant.

WARREN J. GILBERT

Attorney for Plaintiffs

[Endorsed]: Skagit County, Wash. Filed Sept. 21, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [30]

State of Washington
County of Skagit—ss.

Ellen Barnard, being first duly sworn upon oath deposes and says: That she is the guardian ad litem for the plaintiff Fern Peck, named in the above en-

titled action. That she makes this verification as such guardian ad litem, that she has read the above and foregoing complaint, knows the contents thereof and that the allegations contained therein are true, as she verily believes.

ELLEN BARNARD

Subscribed and sworn to before me this 9th day of Sept. 1937.

WARREN J. GILBERT

Notary Public in and for the State of Washington,
residing at Mount Vernon. [31]

[Title of Court and Cause Skagit County.]

ORDER OF REMOVAL

At this time comes the defendant Republic Gear Company, a corporation, and presents a petition asking for the removal of the above entitled action from the Superior Court of the State of Washington for Skagit County, to the District Court of the United States for the Western District of Washington, Northern Division, which petition sets forth the reasons for said removal, to-wit:

That this action is of a civil nature, and that the amount in dispute as against this petitioning defendant, exclusive of interest and costs, exceeds the sum of \$3,000; that the controversy in this action as between plaintiffs and this petitioning defendant is between citizens of different states, plaintiffs being citizens and residents of the State of Washington,

and this petitioning defendant being a citizen and resident of the State of Michigan.

And it appearing from said petition that said action is pending undetermined in this court, and that said action became removable for the first time upon the serving and filing of plaintiffs' amended complaint herein on or about the 15th day of September, 1937, and that the time has not yet arrived at which said petitioning defendant is required by the laws of the State of Washington or the rules of the Superior Court of the State of Washington, the court in which this action is brought, to answer or otherwise plead to plaintiffs' amended complaint herein, and that no application has previously been made to any court or judge for the order applied for in said petition; [32]

And it further appearing to the court that this defendant has presented a bond to this court as provided by law, and it further appearing to the court that said bond and petition are sufficient to authorize the removal of said action into the District Court of the United States for the Western District of Washington, Northern Division, now, therefore, it is hereby.

Considered, Ordered and Adjudged that said bond be and it is hereby accepted and approved, and that this court proceed no further in this action, and that the same be and it is hereby transferred to the District Court of the United States for the Western District of Washington, Northern Division, and that the clerk of this court prepare and file a com-

plete copy of the record of this court in the above entitled action, and certify to the same as a copy of said record, and forward the same to the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, at Seattle, in the County of King, and State of Washington, within thirty days from the filing of the petition herein. To which Plaintiff excepts & exception allowed.

Dated at Seattle, Washington, in open court, this 21st day of September, 1937.

W. L. BRICKEY

Judge

Presented by:

STANLEY B. LONG

of Attorneys for Defendant
Republic Gear Company.

[Endorsed]: Skagit County, Wash. Filed Sept. 21, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [33]

[Title of Court and Cause Skagit County.]

PRAECIPE FOR TRANSCRIPT OF RECORD
ON REMOVAL

To the Clerk of the Above Entitled Court:

Please prepare a full and complete transcript of the record of the above entitled cause for removal to

the United States District Court for the Western District of Washington, Northern Division.

BOGLE, BOGLE & GATES

STANLEY B. LONG

Attorneys for Defendant
Republic Gear Company,
a corporation.

[Endorsed]: Skagit County, Wash. Filed Sept. 21, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [34]

In the Superior Court of the State of Washington
for Skagit County

No. 15524

MELVIN WHITEHEAD and FERN PECK, by
her guardian ad litem, ELLEN BARNARD,
Plaintiffs

vs.

MORRISON MILL CO., a corporation, REPUB-
LIC GEAR COMPANY, a corporation, and
FRANK DAY,

Defendants.

CERTIFICATE

I, Will B. Ellis, County Clerk of Skagit County, and ex-officio Clerk of the Superior Court of the State of Washington in and for said county, do hereby certify that the annexed and foregoing is a

full, true and correct copy of the Petition for Appointment of Guardian ad Litem, Order Appointing Guardian ad Litem, Summons and Complaint, Affidavit of Service, Demurrer, Notice of Issue of Law and Note for Motion Calendar, Petition for Removal, Acceptance of Service, Notice of Removal, Undertaking, Amended Complaint, Order of Removal, and Praecipe for Transcript of record on Removal in the above entitled (action) as the same now appear on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court this 22nd day of September, 1937.

[Seal] WILL B. ELLIS,
Clerk

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 20, 1937. Edgar M. Lakin, Clerk. By S. Cook, Deputy. [35]

[Title of Court and Cause, U. S. District Court.]

21161

ORDER SUSTAINING DEMURRER OF DEFENDANT AND REPUBLIC GEAR COMPANY.

This matter having come on duly and regularly for hearing before the undersigned judge of the above entitled court upon the demurrer of defendant Republic Gear Company to plaintiff's amended

complaint herein, and each cause of action therein contained, upon the ground and for the reason that the same fails to state facts sufficient to constitute a cause of action against said defendant Republic Gear Company, and plaintiffs being represented by their attorneys, Mr. Warren J. Gilbert, and defendant Republic Gear Company, being represented by its attorneys, Messrs. Bogle, Bogle & Gates and Stanley B. Long, and the court having heard argument of counsel, and having considered written briefs filed by both parties above mentioned, and being in the premises fully advised, it is, now therefore, hereby

Ordered that the demurrer of the defendant Republic Gear Company to plaintiff's amended complaint herein, and both causes of action therein contained, be and the same is hereby sustained, to which plaintiffs except and their exceptions are hereby allowed.

It Is Further Ordered, that the plaintiffs and each of them shall have ten days time from the date of filing this order to file a second amended complaint.

Done in open Court this 26th day of March, 1938.

JOHN C. BOWEN

U. S. District Judge.

Approved as to form and notice of presentation expressly waived:

WARREN J. GILBERT

Attorneys for Plaintiffs.

Presented by:

STANLEY B. LONG

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Mar. 26, 1938. Edgar M. Lakin, Clerk. By S. Cook, Deputy. [36]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 21161.

MELVIN WHITEHEAD and FERN PECK, by
her guardian ad litem, Ellen Barnard,
Plaintiffs,

vs.

REPUBLIC GEAR COMPANY, a corporation,
Defendant.

SECOND AMENDED COMPLAINT

Come now the plaintiffs and in accordance with permission given by the court and for a second amended complaint against the defendant allege as follows:

I.

Plaintiff Melvin Whitehead, for his first cause of action against the defendant alleges: That at all times hereinafter mentioned, the defendant Republic Gear Company was and now is a corporation, duly organized and existing with its principal office at Detroit, Michigan, but with an office for the transaction of business in the City of Seattle, King County, Washington, and that said defendant during all the times hereinafter mentioned was and still is, doing business within the State of Washington.

II.

That Melvin Whitehead, at all times herein mentioned, was the owner of one Dodge coupe, 1936 model, engine number D2-135527 and serial number 4026463.

III.

That at all times herein mentioned, Morrison Mill Company, a corporation, was the owner of a Kenworth truck, registration number 20463. [37]

IV.

That at all times hereinafter referred to, the defendant Republic Gear Company was and now is engaged in the manufacturing, distributing and sale of axles for use in trucks, and at some time prior to November 12, 1936, had sold to the Lewis Motor Company of Bellingham, for the purpose of resale to the public, an axle which appeared to be, and if it had not been for the defects hereinafter set forth, would have been, a suitable, safe and proper axle to

be installed in the truck of said Morrison Mill Company as hereinafter described, and on or about the 12th day of November, 1937, said Morrison Mill Company purchased the said axle from the said Lewis Motor Company and installed the same in the said Kenworth, two ton truck, registration number 20463, then owned by said Morrison Mill Company.

V.

That the said Republic Gear Company during all the times prior to the said purchase and subsequent thereto advertised and represented to the public that the said axle was of chrome steel and was a suitable, safe and proper axle to be installed and used in such trucks as the said truck of said Morrison Mill Company, and there was nothing about the said axle which was or would be apparent to a purchaser in the exercise of ordinary care to indicate to such purchaser, or give to such purchaser any notice of, the defects hereinafter set forth, and at all times up to the time of the accident hereinafter set forth, the said Morrison Mill Company had no notice or knowledge, or any reasonable opportunity to have notice or knowledge, of the defects of the said axle hereinafter set forth.

VI.

That as a proximate result of the negligence of the defendant Republic Gear Company in its manufacture and inspection [38] the said axle was defective in the following particulars, to-wit: It was constructed of defective material, in its construc-

tion it had been treated with improper heat treatment, it had been shaped with improper fillets, and, in consideration of the other defects hereinabove specified, it was of inadequate shape and size.

VII.

That the said Morrison Mill Company, after purchasing the said axle installed the same upon its said truck, and in the course of the use of the said truck between the said date of purchase and the time of the accident hereinafter set forth, and as a result of each and all of the defects hereinabove set forth, a defect known to metallurgists as a "fatigue fracture" developed in the said axle.

VIII.

That about midnight of the 26th day of January, 1937, while the said truck of said Morrison Mill Company was being operated upon the Pacific Highway upon the bridge whereby the said Pacific Highway crosses the Skagit River in Skagit County, Washington, and as a proximate result of the defects in said axle as hereinbefore set forth, the said axle broke, and the said truck thereby became disabled upon the said Pacific Highway, and unable to move under its own power, and thereupon stopped on the west half of said paved highway directly in the lane of travel on said highway for traffic proceeding in a southerly direction.

IX.

That while the said truck was so stopped as afore-said on said highway as a proximate result of the negligence of said defendant Republic Gear Company, a corporation, and before it could be removed from the said highway, the car which was being driven by the plaintiff Melvin Whitehead in a careful and prudent [39] manner came into violent collision with the said truck, causing the damages hereinafter alleged.

X.

That as the result of the negligence of the said defendant, this plaintiff suffered severe personal injury, consisting of a blow to the top of his head, cuts on his forehead and a severe blow to his chest, which caused him and still continues to cause him great pain and suffering, on account of which he was unable to work for a period of sixty days. That he was capable of earning \$100.00 per month as a truck driver during said time and was regularly employed at the time of said accident. That he has been required to pay medical expenses and doctors bills in the sum of \$100.00, all to his damage in the sum of \$2,000.00.

For a Second Cause of Action, the plaintiff Melvin Whitehead complains of the defendant and further alleges:

I.

That he repeats all of the allegations contained in paragraphs I to IX, both inclusive, of his first cause of action and makes the same a part hereof by this reference.

II.

That as a proximate result of the defendant's aforesaid negligence, as hereinabove alleged, the 1936 Dodge coupe, serial number 4026463 and engine number D2-135527 owned by the plaintiff was completely demolished to his damage in the sum of \$775.00.

And For a Third Cause of Action against the defendant, Fern Peck, by her guardian ad litem, alleges: [40]

I.

That Ellen Barnard has been appointed guardian ad litem for the plaintiff Fern Peck, and authorized to bring this action.

II.

That the plaintiff re-alleges and makes a part of this cause of action, paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the cause of action of Melvin Whitehead and by reference, makes all of said allegations a part of this cause of action.

III.

That as the proximate result of the negligence of the said defendant, this plaintiff received several severe lacerations on her face, extending from the line of her hair in the middle of her forehead, down to a point between the two eye brows; a cut across her nose from one cheek to the other, cutting into the bridge of the nose, severing of upper lip below the right nostril, a cut on the right side of her chin, a cut on the lower lip and a cut on the right side of

her head. That it was necessary to use twenty-seven sutures in order to bind said lacerations and that as a result thereof, the plaintiff has permanent scars left on her face, which change the contour of her face and mouth and cause her great embarrassment and mental anguish. That said scars have permanently disfigured and changed the contour and expression of her face. That the plaintiff was an attractive girl before said accident, but now she has been made unattractive by reason of said permanent scars. That the plaintiff received a severe blow to her back and both knees were injured, all said injuries causing her severe pain and discomfort. That the plaintiff was an able bodied person, capable of earning \$90.00 per month at the time of said accident and was employed at the wage of \$60.00 per month and board, at the time of said accident; and she was prevented by reason of said injuries from performing said duties for a period of two months, all to her damage in the [41] sum of \$7,500.00. That it was necessary for the plaintiff to employ medical assistance and hospital aid, all for the reasonable sum of \$250.00, which it will be necessary for her to pay.

Wherefore, plaintiffs pray for judgment against the defendant as follows, to-wit:

Plaintiff Melvin Whitehead prays judgment against the defendant on his first cause of action in the sum of \$2100.00, and upon his second cause of action in the sum of \$775.00.

The plaintiff Fern Peck, by her guardian ad litem, Ellen Bernard, prays judgment against the said defendant in the sum of \$7750.00.

And plaintiffs pray for interest on said sums, and for costs of suit, and for such other relief as to the court shall seem just and proper.

SHANK, BELT, RODE & COOK
Attorneys for Plaintiffs.

Office and postoffice address:

1401 Joseph Vance Building,
Seattle, King County, Washington. [42]

State of Washington

County of Skagit—ss:

Ellen Barnard, being first duly sworn, upon oath deposes and says: That she is the guardian ad litem for the plaintiff Fern Peck, named in the above entitled action. That she makes this verification as such guardian ad litem. That she has read the above and foregoing complaint, knows the contents thereof and that the allegations contained therein are true, as she verily believes.

MRS. ELLEN BARNARD

Subscribed and sworn to before me this 26th day of March, 1938.

[Seal] WARREN J. GILBERT

Notary Public in and for the State of Washington,
residing at Mt. Vernon.

Copy received Mar. 30, 1938.

BOGLE, BOGLE & GATES.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 30, 1938. Edgar M. Lakin, Clerk. By Elmo Bell, Deputy. [43]

[Title of District Court and Cause.]

DEMURRER

(to Second Amended Complaint)

Comes now Republic Gear Company, the defendant above-named, through its undersigned attorneys, and demurs to plaintiff's second amended complaint herein and each cause of action therein contained upon the ground and for the reason that same fails to state facts sufficient to constitute a cause of action against this defendant, or otherwise.

BOGLE, BOGLE & GATES

Attorneys for Defendant

Republic Gear Company.

Copy hereof received this April 2, 1938.

SHANK, BELT & RODE.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 2, 1938. Edgar M. Lakin, Clerk. By S. Cook, Deputy. [44]

[Title of District Court and Cause.]

MOTION TO STRIKE SECOND AMENDED
COMPLAINT

Comes now the defendant, Republic Gear Company, and moves the court for an order striking plaintiff's second amended complaint herein upon the ground and for the reason that said second amended complaint is sham, frivolous and contains

no new, different or additional material allegations from the allegations contained in plaintiff's amended complaint herein to which this court has heretofore sustained a demurrer as appears from the court's order of March 26, 1938.

This motion is based upon the records and files herein and upon the affidavit of Stanley B. Long, one of the attorneys for defendant, Republic Gear Company, hereto attached.

BOGLE, BOGLE & GATES

Attorneys for Defendant.

State of Washington,
County of King—ss.

Stanley B. Long, being first duly sworn, upon oath deposes and says:

That he is an attorney at law, a member of the law firm of [45] Bogle, Bogle & Gates, attorneys for defendant Republic Gear Company, and that he makes this affidavit in support of the foregoing motion to strike plaintiff's second amended complaint herein. That on or about the 24th day of April, 1937, an action was instituted in the Superior Court of the State of Washington for Skagit County by Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, plaintiffs, versus Morrison Mill Company, a corporation, and Republic Gear Company, a corporation, and Frank Day, defendants, said action arising out of the same accident as that described in plaintiff's amended complaint and second amended complaint herein; that said com-

plaint contained certain allegations of negligence directed to defendants Morrison Mill Company and the driver of the truck, Frank Day, in addition to the defendant Republic Gear Company; and that said defendant Republic Gear Company served and filed its demurrer to plaintiff's complaint in said original action upon the ground and for the reason that said complaint, as to Republic Gear Company, failed to state facts sufficient to constitute a cause of action. That prior to the court's ruling upon said demurrer, plaintiff filed an amended complaint in said action in said court. That in the original action above referred to, the plaintiffs were represented by their attorney, Warren J. Gilbert, and the defendants Morrison Mill Company and Frank Day were represented by the law firm of Shank, Belt, Rode & Cook of Seattle, Washington, the defendant Republic Gear Company being represented by the law firm of Bogle, Bogle & Gates and your affiant. That prior to the filing of the plaintiff's amended complaint above referred to, your affiant is informed and believes that said defendant Morrison Mill Company entered into negotiations for and consummated a settlement of plaintiff's cause of action against said defendant, said negotiations for settlement and consummation thereof being carried on and conducted by the said [46] Warren J. Gilbert, as attorney for plaintiff, and the law firm of Shank, Belt, Rode & Cook, as attorneys for said Morrison Mill Company; that after completing said settlement, your affiant is informed and believes, and, therefore, al-

leges that arrangement was made between said counsel representing the plaintiffs and said defendant Morrison Mill Company for plaintiff to file an amended complaint joining said Morrison Mill Company as a party defendant although eliminating any allegations of negligence against said defendant, thereby making said complaint as to said defendant Morrison Mill Company clearly demurrable. That immediately following the service of said amended complaint and in view of the failure to allege any negligence on the part of said Morrison Mill Company, all in pursuance of an agreement entered into for settlement purposes between plaintiffs and defendant Morrison Mill Company through their respective counsel, a petition for the removal of said action to the above entitled court was filed and said cause was removed in pursuance thereto. That thereafter your affiant, as attorney for defendant Republic Gear Company, served and filed his demurrer to plaintiff's complaint herein, which, after argument and submission of briefs, was sustained by the court and an order entered accordingly. That upon the request of Warren J. Gilbert, as attorney for plaintiff, for an additional ten days in which to file the second amended complaint, a provision permitting said procedure was included in said order.

That on March 30, 1938, your affiant, as attorney for said Republic Gear Company, received notice of withdrawal of Warren J. Gilbert as attorney for plaintiffs and the notice of appearance of

Messrs. Shank, Belt, Rode & Cook as substituted attorneys for plaintiff and was, on said date, served with the second amended complaint herein above referred to. That said second amended complaint is [47] wholly sham and frivolous and fails to set forth any new, different or material allegations of negligence on the part of said Republic Gear Company than those heretofore set forth and pleaded in plaintiff's amended complaint to which this court sustained a demurrer upon the ground that insufficient facts were therein set forth to constitute a cause of action against said defendant Republic Gear Company.

That your affiant is informed and believes and, therefore, alleges that a settlement has heretofore been reached and consummated between plaintiffs and said defendants Morrison Mill Company; that said action is now being prosecuted by the attorneys for said Morrison Mill Company in an attempt to recover a portion of or all the amount so paid the plaintiff in settlement of the cause of action against the defendant Morrison Mill Company. That said action is not being prosecuted in good faith; that in view of said settlement between plaintiffs and said defendant Morrison Mill Company, no recovery could be had against this defendant, Republic Gear Company, in any event as a joint-tortfeasor. That by reason of the collusive action and agreement between said plaintiffs and the representative of said Morrison Mill Company, who are not made parties defendant in said second amended

complaint, defendant Republic Gear Company will be put to considerable expense and inconvenience and the time of this court will be taken up and consumed by the useless and frivolous action. That said second amended complaint herein should be stricken and that the cause of action set forth in plaintiff's amended complaint herein be dismissed with prejudice and with costs to said defendant Republic Gear Company.

STANLEY B. LONG

Subscribed and sworn to before me this 1st day of April, 1938.

[Seal] J. CLARE BALL

Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 2, 1938. Edgar M. Lakin, Clerk. By S. Cook, Deputy. [48]

[Title of District Court and Cause.]

ORDER SUSTAINING DEMURRER OF DEFENDANT REPUBLIC GEAR COMPANY TO PLAINTIFFS' SECOND AMENDED COMPLAINT.

This matter having come on duly and regularly for hearing before the undersigned judge of the above entitled court upon the demurrer of defendant Republic Gear Company to plaintiffs' second

amended complaint herein, and upon the motion of defendant Republic Gear Company to strike plaintiffs' second amended complaint herein, and plaintiffs being represented by their attorneys of record, Messrs. Shank, Belt, Rode & Cook, and defendant being represented by its attorneys, Messrs. Bogle, Bogle & Gates, Stanley B. Long and Donald E. Leland, and the court having heard argument of counsel and having considered written briefs filed by both parties herein, and being in the premises fully advised, and the court having orally ruled that defendant's motion to strike plaintiff's second amended complaint herein is well taken and is granted, and the court having orally sustained defendant's demurrer to plaintiff's second amended complaint herein, and being in the premises fully advised, it is, now, therefore, hereby

Ordered, Adjudged and Decreed that the demurrer of the defendant Republic Gear Company to plaintiffs' second amended complaint herein and each cause of action therein contained be and the same is hereby sustained.

It Is Hereby Further Ordered, Adjudged and Decreed that defendant's motion to strike plaintiffs' second amended complaint be and the same is hereby granted.

It Is Further Ordered that plaintiffs be not permitted to file a further amended complaint herein, and said action and each cause of action therein contained be and the same is hereby dismissed with

prejudice and with costs in favor of said defendant Republic Gear Company. [49]

Plaintiffs except to the foregoing, and their exception is hereby allowed.

Done in Open Court this 3rd day of May, 1938.

JOHN C. BOWEN

District Judge

Approved as to form:

SHANK, BELT, RODE & COOK

Attorneys for Plaintiff

Presented by:

STANLEY B. LONG

of Bogle, Bogle & Gates,

Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 3, 1938. Edgar M. Lakin, Clerk. By S. Cook, Deputy. [50]

[Title of District Court and Cause.]

NOTICE OF APPEAL AND ALLOWANCE

The above named plaintiffs, Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, conceiving themselves aggrieved by the final judgment of dismissal entered on May 2, 1938, in the above entitled proceeding, do hereby appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and they pray that this their appeal may be allowed; and

that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

SHANK, BELT, RODE & COOK
Attorneys for Plaintiffs and
Appellants, 1401 Joseph Vance
Building, Seattle, Washington.

And now, on this 15th day of June, 1938, it is Ordered that the above appeal be allowed as prayed for.

JOHN C. BOWEN

District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 15, 1938. Edgar M. Lakin, Clerk. By Elmo Bell, Deputy. [51]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS.

Come now the above named plaintiffs and appellants and make and file this their assignment of errors:

1. The said District Court erred in sustaining the demurrer to the second amended complaint of these plaintiffs.

2. The said District Court erred in striking plaintiffs' second amended complaint herein.

3. The said District Court erred in dismissing the said action.

SHANK, BELT, RODE & COOK
Attorneys for Plaintiffs and
Appellants.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 15, 1938. Edgar M. Lakin, Clerk. By Elmo Bell, Deputy. [52]

[Title of District Court and Cause.]

APPEAL BOND

Know All Men by These Presents that we, Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, as principal, and National Surety Corporation, a New York Corporation, authorized to transact surety business in the State of Washington, as surety, are held and firmly bound unto the above named Republic Gear Company, a corporation, in the sum of Five Hundred Dollars (\$500.00), to be paid to the said Republic Gear Company, a corporation, for the payment of which well and truly to be made, we bind ourselves, and each of us, jointly and severally, firmly by these presents.

Dated this 14th day of June, 1938.

Whereas the above named Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Cir-

cuit to reverse the judgment rendered in the above entitled suit;

Now, Therefore, the condition of this obligation is such that if the above named Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, shall prosecute the said appeal to effect and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

MELVIN WHITEHEAD

FERN PECK,

By her guardian ad litem,

By SHANK, BELT, RODE & COOK

Their Attorneys. Principal

NATIONAL SURETY

CORPORATION

By J. H. LOBDELL

Attorney-in-Fact. Surety.

The above bond approved this 15th day of June, 1938.

[Seal]

JOHN C. BOWEN

District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 15, 1938. Edgar M. Lakin, Clerk. By Elmo Bell, Deputy. [53]

[Title of District Court and Cause.]

PRAECIPE FOR RECORD

To the Clerk of the above described Court:

You are requested to take a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal allowed in the above entitled cause, and to include in such Transcript of Record the following, to-wit:

1. Transcript of Record from the Superior Court of Skagit County, Washington.
2. Order Sustaining Demurrer to First Amended Complaint.
3. Second Amended Complaint.
4. Demurrer to Second Amended Complaint.
5. Motion to Strike Second Amended Complaint.
6. Order Sustaining Demurrer to Plaintiffs' Second Amended Complaint and Dismissing Action.
7. Notice of Appeal and Allowance.
8. Assignment of Errors.
9. Appeal Bond.
10. Original Citation.
11. This Praecipe.

SHANK, BELT, RODE & COOK
Attorneys for Plaintiffs and
Appellants.

Copy hereof received this 16th day of June, 1938.

BOGLE, BOGLE & GATES

Attorneys for Defendant and Respondent,
Republic Gear Company, a corporation.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 16, 1938. Edgar M. Lakin, Clerk. By S. Cook, Deputy. [54]

[Title of District Court and Cause.]

I, Edgar M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 54, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 120 folios at .15¢.....	\$18.00
Appeal fee (Sec. 5 of Act).....	5.00
Certificate of Clerk to Transcript of Record.....	.50

Total.....\$23.50

I hereby certify that the above cost for preparing and certifying record, amounting to \$23.50, has been paid to me by the attorneys for the appellant.

I further certify that I attach hereto and transmit herewith the original citation on appeal issued in this cause. [55]

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 25th day of June, 1938.

[Seal] EDGAR M. LAKIN,
Clerk of the United States District Court for the
Western District of Washington.

By ELMO BELL
Deputy. [56]

United States of America—ss:

To: Republic Gear Company, a corporation,
Greeting:

You are hereby cited and admonished to be and appear at the United States District Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California, thirty (30) days from the date of this citation, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States For The Western District of Washington, Northern Division, wherein Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, are appellants, and Republic Gear Company, a corporation, is respondent, to show cause, if

any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness, the Honorable John C. Bowen, this 15th day of June, 1938.

[Seal]

JOHN C. BOWEN

District Judge.

Copy hereof received this 16th day of June, 1938.

BOGLE, BOGLE & GATES,

Attorneys for Republic Gear Co.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 15, 1938. Edgar M. Lakin, Clerk. By S. Cook, Deputy. [57]

[Endorsed]: No. 8880. United States Circuit Court of Appeals for the Ninth Circuit. Melvin Whitehead and Fern Peck by her guardian ad litem, Ellen Barnard, Appellants, vs. Republic Gear Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed July 1, 1938.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.